Supreme Court, U. S.
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80-1092

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

JIMMY EATON AND EVANS BENTON ..... *Petitioners*

vs.

SUPREME COURT OF ARKANSAS COMMITTEE ON PROFESSIONAL CONDUCT ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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GENERAL PUBLISHING COMPANY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

JIMMY EATON AND EVANS BENTON ..... *Petitioners*

VS.

SUPREME COURT OF ARKANSAS COMMITTEE ON PROFESSIONAL CONDUCT ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on October 6, 1980.

QUESTION PRESENTED FOR REVIEW

Whether a State may, consistent with the First Amendment, reprimand two attorneys for placing a printed advertisement advertising initial consultations for $10.00 with other advertisements of non-professional businesses and also to participate in the mailing of such advertisements to 10,000 households in the trade area of the attorneys with each envelope containing numerous printed advertisements and each envelope addressed to "Resident."

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OPINIONS BELOW

The opinion below is reported at 270 Ark. 273 (1980). It is appended hereto as Appendix A. Appendix B is the opinion of the administrative agency in this case, the Arkansas Supreme Court Committee on Professional Conduct, Hon. Clint Huey, Chairman.

JURISDICTION

The judgment sought to be reviewed was made and entered on October 6, 1980. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 2

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Amendment I, United States Constitution

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Arkansas Code of Professional Responsibility as amended in Per Curiam, 263 Ark. 948 (1978)

Disciplinary Rule 2-101(A):

"A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."

Disciplinary Rule 2-101(B)

"In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A).

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices . . .;

* * *

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Fee for an initial consultation;

(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;

* * *

(25) Fixed fees for specific legal services, which must be accompanied by a description of the services which shall not be misleading or deceptive . . ."

Disciplinary Rule 2-103(A)

"A lawyer shall not, except as authorized in DR-2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

STATEMENT OF THE CASE

The petitioners are two young attorneys practicing as partners under the firm name of Eaton and Benton, Attorneys at Law. Their law office is located in North Little Rock, Arkansas.

In March, 1974, the petitioners contacted the local representative of Val-Pak. Val-Pak is a national company offering advertising services to businesses. On June 1, 1979, the following reproduced advertisement was mailed along with several ads for other businesses to 10,000 households in North Little Rock, Arkansas.

NEED A LAWYER?

FIRST CONSULTATION - 10^{00}

The law offices of Eaton and Benton will charge you only $10.00 for your first consultation session with an attorney. There is no time or subject limitation. If after your first session you need or want additional legal services, we will supply you with a written fee quotation. If you do not wish to continue with your case after consultation, you are under no further obligation. Sorry, but we can not provide legal advice over the telephone until you have been interviewed in person by an attorney. Phone for appointment.

OFFICE HOURS: Mon. - Fri. 8:30-5:00, Sat. 10:00-2:00, Mon. 5 PM-7 PM

- NEED A WILL?
- BUYING REAL ESTATE?
- TAX PROBLEMS?
- SEPARATION OR DIVORCE?
- DEBT PROBLEMS?
- PERSONAL INJURY CLAIMS?
- PROBATE REQUIRED?
- OTHER LEGAL PRORLEMS?

LAW OFFICES
OF
EATON AND BENTON
Suite 525, Twin City Bank Bldg.
North Little Rock, Arkansas
Phone: 372-2236

Vol-Pak of Arkansas, No. 11027 A

Petitioners subsequently received a letter from the Supreme Court of Arkansas Committee on Professional Con-

duct advising that a complaint had been made in regard to their advertisement. Petitioners responded to the letter by affidavit as requested.

In the affidavit the petitioners stated "However, if there is some question as to some minor technical violation of the disciplinary rules, then we shall assert our First Amendment rights as set forth in *Bates* v. *State Bar of Arizona,* 97 S. Ct. 2691 (1977) and succeeding cases." (Tr. 117, Exhibit 1, page 3)

The petitioners then received another letter from the Committee, advising them their advertisement was in violation of the Code of Professional Responsibility, Disciplinary Rule 2-101(B) as amended by the Supreme Court of Arkansas in its Per Curiam opinion of June 17, 1978, 263 Ark. 948 (1978).

Petitioners requested a hearing which was held in November 1979. At the hearing the petitioners again raised the issue of constitutional protection. (Tr. 18) In December, 1979, the Committee notified the petitioners that they had voted to sustain the letter of reprimand. The petitioners then sought appeal to the Supreme Court of Arkansas.

The issue before the Supreme Court of Arkansas was whether the contents and method of dissemination of the advertisement violated the Disciplinary Rules. And if so, then whether the activity of petitioners was protected by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment.

The court below found the advertisement violated the Disciplinary Rules and that such actions were not protected by the First Amendment to the United States Constitution.

ARGUMENT FOR ALLOWANCE OF WRIT

I.

CONFLICT BETWEEN STATE COURTS OF LAST RESORT.

The decision of the Arkansas Supreme Court is in direct conflict with the decision of the Kentucky Supreme Court in *Kentucky Bar Association* v. *Stuart,* 568 S.W. 2d 933 (1978) and of the decision of the New York Court of Appeals in *In re Koffler,* 49 LW 2290 (10/21/80).

In all cases the facts concerned the mailing of advertisement material by attorneys. In *Kentucky Bar Association* v. *Stuart,* letters were mailed by attorneys to two real estate agencies stating the price at which certain routine services could be performed. In unanimously dismissing the complaint against the attorneys and with it the public reprimand against them, the Kentucky Court relied upon *Bates* v. *State Bar of Arizona,* 433 U.S. 350; *In re Primus,* 436 U.S. 412 and *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 477.

Citing *Ohralik,* the Court observed:

> "None of the evils are present here which exist in the case of 'in person' solicitation. There is not even the danger of exertion of pressure or demands to encourage a person to make a speedy and possibly uninformed decision whether to seek an attorney's assistance with a problem." *Kentucky Bar Association* v. *Stuart,* 568 S.W. 2d 933, 934 (Kentucky 1978).

In re Koffler, decided October 21, 1980, by the New York

Court of Appeals held unconstitutional the statute and code provision prohibiting advertising of attorneys' services by direct mail. *In re Koffler* dealt with the mailing by two attorneys of a letter to real property owners that solicited use of their services in connection with the sale of real property. They also mailed a letter to a number of real estate brokers soliciting the brokers to refer clients to them in connection with the purchase or sale of real property.

The New York Court of Appeals in *Koffler* relied heavily upon the recent decision of this court in *Central Hudson Gas and Electric Corporation* v. *Public Service Commission of New York,* 48 LW 4783 (Decided June 20, 1980) in holding that invasion of privacy and the possibility of overbearing persuasion are not sufficiently possible in mail solicitation to justify banning it. A recipient of a lawyer's letter may escape exposure to objectionable material simply by throwing it in the waste basket.

The case at hand accords more closely with the spirit of *Bates* than does either *Stuart* or *Koffler*. The latter cases dealt with letters specifically addressed on attorney letterheads to persons known to have specific legal needs. The case at hand deals with an advertisement of initial consultations in the form of a "resident" mailing to 10,000 households in the market area of the petitioners.

II.

OPINION BELOW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In *Central Hudson Gas and Electric Corporation* v. *Public Service Commission,* 48 LW 4783 (Decided June 20, 1980) this Court set

up a four-part analysis for restrictions on commercial speech. The Supreme Court of Arkansas failed to even apply this four-part analysis to the facts of this case. The first provision asked whether the expression is protected by the First Amendment. In both *Bates* and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, the Court held that professional advertising is subject to First Amendment protection. The advertisement of the petitioners as reproduced earlier is not misleading or unlawful activity.

The Arkansas Supreme Court failed to consider "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson Gas and Electric Corporation* v. *Public Service Commission of New York,* 48 LW 4783, 4785.

III.

SUBSTANTIAL FEDERAL QUESTION.

This is the first case to come to this Court concerning the validity and interpretation of the Code of Professional Conduct as it has been amended by the American Bar Association and the state regulatory authorities in light of *Bates.*

In light of *Bates,* the American Bar Association recommended two alternate proposals of the disciplinary rules for adoption by state authorities. The Arkansas Supreme Court in effect adopted proposal "A". Most states have adopted one form or the other or have adopted its own set of rules to regulate advertising.

As a result, confusion is fast developing as to the extent and

limits of lawyer advertising. This is the first case to directly put under scrutiny one state's attempt to satisfy the requirement of *Bates*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH BROWN
P.O. BOX 3773
PHONE: 501-378-7877
LITTLE ROCK, ARKANSAS 72203
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have personally served three copies of this petition for writ of certiorari upon counsel for the Supreme Court Committee on Professional Conduct, Philip E. Dixon, 1550 Tower Bldg., Little Rock, AR 72201.

I further certify that all parties required to be served have been served.

/s/ Robert Joseph Brown
ROBERT JOSEPH BROWN
P.O. Box 3773
Little Rock, Arkansas 72203
Counsel for Petitioners

APPENDIX A

SUPREME COURT OF ARKANSAS

In Re: Jimmy EATON and Evans BENTON
v. SUPREME COURT OF ARKANSAS,
COMMITTEE ON PROFESSIONAL CONDUCT

80-4

Opinion delivered October 6, 1980

FRANK HOLT, Justice. Petitioners, attorneys practicing law in North Little Rock, appeal from the decision of the respondents' issuance of a private reprimand as a result of the attorneys' actions in advertising their firm.

In March, 1979, the petitioners contracted with Val-Pak Advertising to include an advertisement of their firm in a mail-out packet with other advertisements to a target area of 10,000 households in the North Little Rock area. Their advertisement was so mailed in June. Petitioners subsequently received a letter from the respondent Committee advising a complaint had been made to it in regard to this advertisement. Petitioners responded to this letter as requested. They received another letter from the Committee, advising them their advertisement was in violation of the Code of Professional Responsibility, DR 2-101 (B). This letter contained the reprimand. A third letter from the Committee, in response to a request by petitioners for a more specific statement, again advised the contents of the ad and the method of making it known to the public violated the purpose and intent of DR 2-101 (B). Petitioners requested a hearing, which was held in November. In December, 1979, the Committee notified the petitioners that they had voted to sustain the letter of reprimand for violation of DR 2-101 (B). The letter advised that the violation of this section also encompassed

DR 2-101 (A), 2-103(A); the letter also cited 2-101 (B) (25) specifically and added DR 2-104 (A). As we understand from oral argument, the latter rule is no longer involved.

Our rule 2-101 (B) permits advertising "[i]n order to facilitate the process of informed selection of a lawyer by potential consumers of legal services." This section incorporates by reference 2-101 (A) which prohibits "the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Also 2-103 is included by reference. 2-103 (A) prohibits a lawyer, except as provided in 2-103 (B), from recommending employment of himself or firm to a nonlawyer who has not sought his advice concerning a lawyer.

The petitioners rely heavily on *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), to support their contention the advertisement itself was permissible. The following advertisement was considered by the court in *Bates*:

ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES

- **Divorce or legal separation--uncontested (both spouses sign papers)**

  $175 00 plus $20 00 court filing fee

- **Preparation of all court papers and instructions on how to do your own simple uncontested divorce**

  $100 00

- **Adoption--uncontested severance proceeding**

  $225 00 plus approximately $10 00 publication cost

- **Bankruptcy--non-business, no contested proceedings**

  Individual
  $250 00 plus $55 00 court filing fee

  Wife and Husband
  $300 00 plus $110 00 court filing fee

- **Change of Name**

  $95 00 plus $20 00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen

617 North 3rd Street
Phoenix, Arizona 85004
Telephone [602] 252-8888

Here the advertisement is:

NEED A LAWYER?

FIRST CONSULTATION - $10^{00}

- NEED A WILL?
- BUYING REAL ESTATE?
- TAX PROBLEMS?
- SEPARATION OR DIVORCE?
- DEBT PROBLEMS?
- PERSONAL INJURY CLAIMS?
- PROBATE REQUIRED?
- OTHER LEGAL PROBLEMS?

The law offices of Eaton and Benton will charge you only $10.00 for your first consultation session with an attorney. There is no time or subject limitation. If after your first session you need or want additional legal services, we will supply you with a written fee quotation. If you do not wish to continue with your case after consultation, you are under no further obligation. Sorry, but we can not provide legal advice over the telephone until you have been interviewed in person by an attorney. Phone for appointment.

LAW OFFICES OF EATON AND BENTON

Suite 525, Twin City Bank Bldg.
North Little Rock, Arkansas
Phone: 372-2236

OFFICE HOURS: Mon. - Fri. 8:30-5:00, Sat. 10:00-2:00, Mon. 5 PM-7 PM

VISA

(6)

Vol-Pak of Arkansas, No. 11927 A

The mailing packet or envelope reflects:

Although the advertisements are in some respect similar, the one in *Bates* listed specific services and their corresponding fees. Here the only fee listed was a $10 fee for an initial consultation, which is permissible under DR 2-101 (B) (20). However, the petitioners then propounded a series of questions on the need for legal services on certain subjects. They contend the queries were merely designed to indicate the areas of law in which they would consult. Also the last query, "Other legal problems?", coupled with the phrase, "There is no time or subject limitation", could indicate to the lay person that these petitioners were competent to consult and advise on any legal problem. We fail to see how this broad sweep, without any indication of charges, is sufficient information to assist one in need of legal services to make an informed selection.

We also agree with the Committee that the manner of dissemination is impermissible. This advertisement was included in a packet with other advertisements, all but three being coupons for discounts at local businesses. The mail-out packet included a coupon for french fries with the purchase of a hamburger, coupons for discounts on meals at local restaurants, a discount from a "Figure Salon and Health Spa" on a one month membership, a discount on tune-ups and auto repairs, a gift certificate from a local shoe store and one from a fabric store, both requiring purchases, a coupon from a travel company offering a free item, a coupon offering a special on seamless guttering, an advertisement from Val Pak itself, and an advertisement for a free home appraisal and a "garage sale" sign from a real estate company. The front of the envelope, previously reproduced, had printed on it "Valuable coupons from local businesses." The mail-out advertisement certainly could be understood by a recipient as appearing to be a discount offer and a solicitation of legal services.

Furthermore, it was in violation of the rule requiring such advertisements to be informative in nature, 2-101 (B), as

noted above. Its primary purpose was not to inform the consumer to facilitate an informed choice by allowing fee comparison, but rather to urge a group of specific potential consumers to seek petitioners' services, and, therefore, this constituted solicitation. See *In the Matter of Koffler,* 420 N.W.S. 2d 560 (1979). The advertisement in *Bates* listed fees for certain services, which is permissible under our rules. DR 2-101 (B) (25). In *Bates,* Justice Blackmun, writing for the court, acknowledged that the "heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which certain routine services will be performed." The court held that advertising by attorneys is subject to limitations, which preclude false, deceptive or misleading advertising; there may also be reasonable restrictions on the time, place and manner of advertising. The advertisement here did not meet the stated purpose of advertising legal services, in that there was no indication to the consumer how these petitioners were competitive other than their initial consultation fee. The contract between petitioners and Val Pak provided that no competitors' advertisements would be sent in the same mailing packet without the permission of the petitioners. As the Committee stated: "This provision clearly shows that the intent of the ad was to solicit customers for the individual advertisers, not to provide potential consumers of legal services with a means of making an informed selection of an attorney. It also suggests that the ad is merely a lure to get customers into the advertiser's place of business."

We have considered the cases cited by petitioners in their brief which are concerned with advertisements and offers by mail. *In re Primus,* 436 U.S. 412 (1978); *Kentucky Bar Ass'n* v. *Stuart,* 568 S.W. 2d 933 (Ky. 1978); and *In the Matter of Koffler, supra.* In *Primus,* also relied on heavily by petitioners, the court specifically found the letter there was not "facially misleading" and that it imparted information allowing the recipient to make an informed decision about whether or not to authorize the litigation in question. The court there again stated that a state "is free to fashion reasonable restrictions

with respect to the time, place, and manner of solicitation by members of its Bar . . . The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." Here we find that a combination of the content and the manner of dissemination in this case constitutes a violation of our rules.

We next consider petitioners' contention that there was a lack of notice and therefore due process in that the petitioners were not advised of the particulars of their violation, only being notified that the advertisement violated DR 2-101 (B). This rule incorporates by reference 2-101 (A) and 2-103.

We need not reach the sufficiency of notice issue since the petitioners have failed to include in the record and to abstract the letter sent to them in August advising them that a complaint had been lodged against them with the Committee alleging violation of the ethical rules governing advertising by lawyers and, further, insufficiently abstracting the September letter sent by the Committee. See *Manes* v. *M.O.V.E., Inc., et al,* 261 Ark. 793, 552 S.W. 2d 211 (1977); and Rules of the Supreme Court, Rule 9.

Even if we were to consider this issue on its merits, we do not find reversible error since petitioners have not demonstrated in what manner they have been prejudiced. They contend that, had they known in more detail the charges and the name of the complainant, they could have introduced evidence from satisfied clients and through cross-examination shown that this advertisement was not misleading. However, in *Ohralik* v. *Ohio State Bar Assn.,* 436 U.S. 447 (1978), the Supreme Court held:

[A]ppellant errs in assuming that the constitutional

> validity of the judgment below depends on proof that his conduct constituted actual overreaching or inflicted some specific injury on [the clients solicited]. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.
>
> Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs . . .

Although the case here did not involve person to person solicitation as occurred in *Ohralik,* we find the above language to be applicable.

Furthermore, there is no requirement that the original complaint filed against an attorney be furnished him, as petitioners contend. Neither the rules nor case law so requires. Rule III, relied on by petitioners, makes it the duty of the Executive Secretary of the Committee to assist a complainant in preparing a detailed complaint in affidavit form. This rule then provides the Executive Secretary shall furnish a copy of the formal complaint to the attorney complained against. However, here the Committee had before it the advertisement which formed the basis of the complaint and thus had independent knowledge of the alleged misconduct. Rule IV provides that the Committee shall investigate complaints as to which any member has information and shall give the attorney an opportunity to explain or refute the charge. In *Weems* v. *Sup. Ct. Comm. on Prof. Conduct,* 257 Ark. 673, 523 S.W. 2d 900 (1975), we rejected an argument that Rule IV requires an affidavit of complaint or a statement that a member of the Committee had information. We held an affidavit is not required before the Committee may investigate and a statement of the source of information is not required.

Finally, we find no violation of the First Amendment to the United States Constitution nor to Article 2, § 6, of the Arkansas Constitution, as petitioners urge. The Supreme Court, in *Bates,* specifically allowed the states to regulate the manner, time and place of advertising. This right was affirmed in *Ohralik*:

> . . . A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation . . . While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.

Further, this court was well aware of federal and state constitutional requirements when it adopted the disciplinary rules.

Affirmed.

APPENDIX B

SUPREME COURT OF ARKANSAS
Committee on Professional Conduct

December 7, 1979

COMMITTEE:

Clint Huey, Chairman
Warren
Dale Price, Secretary
Little Rock
James W. Steinsiek
Blytheville
Russell Elrod
Siloam Springs
Caldwell T. Bennett
Batesville
Jerry W. Cavaneau
Searcy
Walter R. Niblock
Fayetteville

Taylor R. Roberts, Executive Sec'y.
227 Prospect Building
1801 North University
Little Rock, Arkansas 72207
(501) 664-6648

Mr. Jimmy Eaton
Mr. Evans Benton
Attorneys at Law
Suite 525
Twin City Bank Building
North Little Rock, Arkansas 72114

RE: Val-Pak Advertisement

Gentlemen:

The Committee on Professional Conduct has carefully considered the testimony received at the hearing on November 30, 1879, and a majority of members have voted to sustain the letter

of reprimand previously given. The reprimand is for violation of Section 2-101(B) of the Code of Professional Responsibility, American Bar Association, as amended by Per Curiam Order of the Supreme Court dated July 17, 1978, which allows an attorney to publish or broadcast certain information to facilitate the process of informed selection of a lawyer by potential consumers of legal services. The violation of this section also encompasses DR2-101(A), DR2-103(A), and DR2-101(B)(25) specifically. Your conduct relative to the advertisement also violated DR2-104(A) of the Code.

This reprimand will be entered in the confidential files of the committee and may be considered in determining the action it might take in the event of any further complaints filed against you.

Yours very truly,

/s/ Clint Huey
The Supreme Court of Arkansas
Committee on Professional Conduct by
Clint Huey, Chairman

CH/lf

cc: Attorney Arnold Goodman